

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

EMMETT WESSON,

Petitioner,

vs.

TERESA HUNT,

Respondent.

NO. CV-05-5057-CI

REPORT AND RECOMMENDATION TO  
DISMISS PETITION WITHOUT PREJUDICE

Petitioner, a federal prisoner at FCI Safford, Arizona, brings this habeas action pursuant to 28 U.S.C. § 2241. He challenges his conviction and sentence for distribution of a controlled substance under 21 U.S.C. § 841(a)(1), see cause number CR-01-6027-RHW. Petitioner asserts the Controlled Substances Act is unconstitutional as applied to the States, and thus divested the U.S. District Court of subject matter jurisdiction. He also argues his sentence is "void, ab initio" based on *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *United States v. Booker*, --- U.S. ----, ----, 125 S.Ct. 738, 748, 160 L.Ed.2d 621 (2005).

Ordinarily, 28 U.S.C. § 2255 provides the exclusive mechanism by which a federal prisoner may contest the legality of a sentence. *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000). Here, Plaintiff has failed to demonstrate his remedy under § 2255 is

1 "inadequate or ineffective to test the legality of his detention."  
2 *Id.*, at 864-65. The burden is on the petitioner to do so. *Redfield v.*  
3 *United States*, 315 F.2d 76, 83 (9th Cir. 1963).

4 Petitioner asserts a motion under § 2255 would have been wholly  
5 inadequate and ineffective because certain cases were "not available  
6 at that time." Mr. Wesson's argument is flawed. The period of  
7 limitations for filing a motion under 28 U.S.C. § 2255 may be delayed  
8 if a right is "newly recognized by the Supreme Court and made  
9 retroactively applicable to cases on collateral review." Furthermore,  
10 the language of 28 U.S.C. § 2255 makes explicit provisions to allow  
11 second or successive motions where there is "a new rule of  
12 constitutional law, made retroactive to cases on collateral review by  
13 the Supreme Court, that was previously unavailable."

14 The Ninth Circuit has determined, "§ 2241 is not available under  
15 the inadequate-or-ineffective-remedy escape hatch of § 2255 merely  
16 because the court of appeals refuses to certify a second or successive  
17 motion under the gatekeeping provisions of § 2255." *Lorensten v. Hood*,  
18 223 F.3d 950, 953 (9th Cir. 2000)(citation omitted). In addition, a  
19 "remedy is not inadequate or ineffective under section 2255 merely  
20 because the sentencing court denied relief on the merits." *Tripati v.*  
21 *Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988)(citations omitted). Here,  
22 Mr. Wesson has failed to show a § 2255 motion would be an inadequate  
23 or ineffective remedy.

24 Accordingly, **IT IS RECOMMENDED** the petition under 28 U.S.C. §  
25 2241 be **DISMISSED without prejudice** for lack of subject matter  
26 jurisdiction. See Rules 1(b) and 4 of the Rules Governing Section  
27

1 2254 Cases in the United States District Courts.

2 **OBJECTIONS**

3 Any party may object to a magistrate judge's proposed findings,  
4 recommendations or report within ten (10) days following service with  
5 a copy thereof. Such party shall file with the District Court  
6 Executive all written objections, specifically identifying the  
7 portions to which objection is being made, and the basis therefor.  
8 Attention is directed to Fed. R. Civ. P. 6(e), which adds another  
9 three (3) days from the date of mailing if service is by mail.

10 A district judge will make a *de novo* determination of those  
11 portions to which objection is made and may accept, reject, or modify  
12 the magistrate judge's determination. The district judge need not  
13 conduct a new hearing or hear arguments and may consider the  
14 magistrate judge's record and make an independent determination  
15 thereon. The district judge may also receive further evidence or  
16 recommit the matter to the magistrate judge with instructions. See 28  
17 U.S.C. § 636(b)(1)(B) and ©), Fed. R. Civ. P. 73, and LMR 4, Local  
18 Rules for the Eastern District of Washington. A magistrate judge's  
19 recommendation cannot be appealed to a court of appeals; only the  
20 district judge's order or judgment can be appealed.

21 The District Court Executive is directed to enter this Report and  
22 Recommendation and forward a copy to Petitioner.

23 DATED August 3, 2005.

24  
25 S/ CYNTHIA IMBROGNO  
26 UNITED STATES MAGISTRATE JUDGE  
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